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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 196

HERBERT SCHNEIDER, APPELLANT

v.

WILLARD SMITH, COMMANDANT, UNITED STATES COAST GUARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the district court (J.A. 36–44) is reported at 263 F. Supp. 496.

JURISDICTION

This is a direct appeal from the final judgment of a three-judge district court, convened pursuant to 28 U.S.C. 2282. The judgment was entered on January 23, 1967 (J.A. 43), and the notice of appeal was filed on March 17, 1967. Pursuant to an extension of time granted by the district court, the Jurisdictional Statement was filed on May 26, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

On October 9, 1967, the Court entered an order postponing "[f]urther consideration of the question of probable jurisdiction in this case * * * to the hearing of the case on the merits." We agree with appellant that the case was one required to be heard by a statutory court of three judges and, accordingly, that this Court has jurisdiction of the appeal. It appears that appellant did raise in the district court the question whether the Magnuson Act unconstitutionally delegates legislative power to the executive (App. Br. 18, n. 4). While we believe that delegation did not overreach constitutional boundaries, we recognize that the question is sufficiently substantial to warrant convening a special court under 28 U.S.C. 2282. *Zemel* v. *Rusk*, 381 U.S. 1, 6.[1]

STATUTE, EXECUTIVE ORDERS AND REGULATIONS INVOLVED

The Magnuson Act, 64 Stat. 427 (1950), 50 U.S.C. 191, 192 and 194, and the Executive Orders and Regulations issued pursuant thereto are set forth in the appendix to appellant's brief at pages A1–A20.

QUESTIONS PRESENTED

1. Whether the Magnuson Act authorizes the establishment of a screening program for merchant seamen.

2. Whether the Magnuson Act unconstitutionally delegates legislative power to the executive.

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[1] Accordingly, there is no more occasion here than in *Zemel* to decide whether a constitutional attack on regulations issued pursuant to a statutory grant of authority can be deemed an attack on the statute for the purposes of 28 U.S.C. 2282. See 381 U.S. at 6.

3. Whether the First Amendment precludes the Commandant of the Coast Guard from questioning an applicant for a special validation about his past association with the Communist Party or other subversive organizations.

4. Whether appellant may challenge the procedures prescribed for the processing of his application without exhausting his administrative remedies, when the regulations on their face provide procedures that can satisfy the demands of due process.

5. Whether the criteria outlined in the regulations for determining when a special validation should be denied are unconstitutionally vague.

6. Whether the fact that the Commandant may consider past membership in the Communist Party or other subversive organization in determining whether or not a special validation should be issued renders the screening program unconstitutional as a bill of attainder or *ex post facto* law.

STATEMENT

Appellant is the holder of a validly issued merchant marine document No. Z–202156, which evidences his ability to act as a Second Assistant Engineer on steam vessels (J.A. 11).[2] During the period from 1942 to 1949 he served aboard American-flag commercial vessels in various capacities, including wiper, oiler, fireman and fourth, third and second assistant engineer. Since 1949 appellant has been

[2] The document which appellant presently holds is one of a series of such documents which have been issued to appellant since 1943 (J.A. 2–3).

employed in trades other than that of a merchant seaman (J.A. 10).

On October 19, 1964, appellant applied to the Commandant of the Coast Guard for a special validation endorsement on his merchant mariner's document. Under executive orders and regulations promulgated pursuant to the Magnuson Act, 50 U.S.C. 191, such a special validation is necessary to permit an individual to serve aboard merchant vessels of the United States of 100 or more gross tons (J.A. 11). As part of his application, appellant filled out and submitted a "Seaman's Certificate Application" and a "Specially Validated Merchant Mariner's Document Application Questionnaire" (J.A. 25–33).

The questionnaire submitted by appellant contained the following questions and answers relating to his membership and participation in organizations designated by the Attorney General pursuant to Executive Order 10450, 18 F. R. 2489 (J.A. 12):

> ITEM 5. Have you ever submitted material for publication to any of the organizations listed in Item 6 below?
> Answer. No.
> ITEM 6. Are you now, or have you ever been, a member of, or affiliated or associated with in any way, any of the organizations set forth below?
> Answer. Yes.
> If your answer is "Yes", give full details in Item 7.
> ITEM 7. Use this space to explain Items 1 through 6. Show item numbers to which an-

swers apply. Attach a separate sheet if there is not enough space here.

Answer. I have been a member of many political and social organizations, including several named on this list. I cannot remember the names of most of them and could not be specific about any. To the best of my knowledge, I have not been a member of or participated in the activities of these organizations for ten years.

By letter dated March 25, 1965, the Commandant advised appellant that the answers to the questionnaire did not provide sufficient information for him to determine whether appellant's document should be specially validated and requested appellant to respond under oath to certain interrogatories, set out below,[3] relating generally to the extent and meaningfulness of appellant's membership in any of the designated organizations (J.A. 34).

[3] The interrogatories (Exh. A–3, J.A. 34–36) refer to appellant's earlier affirmative answer to the question whether he had been a member of organizations designated by the Attorney General, and to his statement quoted in the text above; he is then asked:

1. With respect to your statements above, furnish the following information, fully and honestly to the best of your ability:

(a) List the names of the political and social organizations to which you belonged, and location.

(b) Furnish approximate dates of membership.

(c) Furnish full particulars concerning the extent of your activities and participation in the organizations (number and type of meetings/functions attended; positions or offices held; classes or schools attended; contributions made; etc.)

(d) Your reason for discontinuing the membership.

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In response to this request for additional information, the Commandant received a letter from appellant's counsel in which it was admitted that appellant had been a member of the Community Party, as well as other organizations on the Attorney General's list, and had subscribed to "The People's World." However, the letter stated that appellant would not answer the propounded questions because "it would be obnoxious to a truly free citizen to answer the kinds of questions under compulsion that you require" (Exh. 5, J.A. 21–23).

As appellant had been advised in the Commandant's letter of March 25, 1965 (Exh. A–3, J.A. 34), no further action was taken on his application because of his failure to provide the additional informa-

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(e) Your present attitude toward the principles and objectives of the organizations.

If your answer is "YES" to the following Questions, *explain* fully in the space provided at the end of the Interrogatories:

2. Are you now, or have you ever been, a member of or affiliated with, in any way, the Communist Party, its Subdivisions, Subsidiaries, or Affiliates? (Answer "Yes" or "No")

3. Have you at any time been a subscriber to the "People's World"? (Answer "Yes" or "No") If your answer is "YES," give dates.

4. Have you at any time engaged in any activities in behalf of the "People's World"? (Answer "Yes" or "No") If your answer is "YES", furnish details.

5. What is your present attitude toward the Communist Party?

6. What is your present attitude toward the principles and objectives of Communism?

7. What is your attitude toward the form of Government of the United States?

tion requested. In declining to process the application further, the Commandant was acting in accordance with Section 121.05(d)(2) of Title 33 Code of Federal Regulations—a copy of which had been enclosed in the letter of March 25, 1965 to appellant—which provides:

> If an applicant fails or refuses to furnish such additional information, the Commandant shall hold in abeyance further consideration of the application, and shall notify the applicant that further action will not be taken unless and until the applicant furnishes such information.

In November, 1965, appellant instituted this action seeking a declaration that the Magnuson Act, the executive orders and regulations issued pursuant thereto and the Commandant's actions thereunder are unconstitutional and praying that the Commandant be directed to approve appellant's application for a special validation endorsement.[4] A three-judge district court was convened and, acting on the basis of admitted facts (J.A. 10–36), the court dismissed the complaint (J.A. 36–44).

SUMMARY OF ARGUMENT

I

We believe that the legislative history and language of the Magnuson Act manifest the intent of Congress to authorize the type of screening program that has been established. Adopted in 1950 during the Korean crisis, the Magnuson Act was an amendment to existing legislation under which personnel screening programs

[4] Appellant also sought a judgment for $10,000.

had been established during World War II, and, according to its sponsor, the new legislation would "give the President the authority to invoke the same kind of security measures which were invoked in World War I and in World War II." The Act expressly empowers the President to take full possession of a vessel and to remove therefrom all "persons not authorized by him to go or remain on board." This necessarily includes authority to establish a screening program.

Nor can it be said that the manner in which Congress granted this power to the President involved an unconstitutional delegation of legislative power to the executive. The Act specifically provides that, when the President determines that the security of the United States is endangered, he shall adopt rules and regulations designed to protect vessels and waterfront facilities from acts of sabotage and subversion and grants him the power to exclude unauthorized persons from any vessel. Thus, here, as in *United States* v. *Robel,* No. 8, October Term, 1967, reargued on October 9, 1967, we contend that the Act meets the standards of a constitutional delegation of authority because it clearly describes "what job must be done, who must do it, and what is the scope of his authority." *Bowles* v. *Willingham,* 321 U.S. 503, 515.

II

The screening program that has been established pursuant to the authority granted to the President by the Magnuson Act does not unconstitutionally infringe on First Amendment rights. The vital interest of the

government in protecting the nation's shipping from sabotage and subversion clearly justifies the inquiries into associational activities which the screening program involves. Questions concerning a person's association with the Communist Party and other subversive organizations have been held proper in many situations where the governmental interest to be protected was not so obvious as it is here. If, as we contend, the First Amendment gives no right to refuse to answer the interrogatories involved here, then, of course, the Commandant was justified in holding appellant's application in abeyance until such time as the questions are answered.

Appellant's other attacks on the procedures which have been established for processing an application for a special validation are prematurely presented. The regulations provide that if appellant supplies the requested information and the application is denied, he will be entitled to a notice from the Commandant setting forth the reasons for the denial and will be given a hearing at which "[e]very effort should be made to produce material witnesses to testify in support of the reasons set forth in the Notice of the Commandant, in order that such witnesses may be confronted and cross-examined * * *." Since the regulations establish procedures that can meet the requirements of due process, appellant should be required to exhaust those procedures before complaining. The question which he now raises concerning the burden of proof and his right to confront witnesses may well prove to be of no consequence once a hearing is held.

Similarly, appellant's claim that the regulations are invalid because they permit the Commandant to take into consideration his membership in the Communist Party and other subversive organizations, without a showing that he had a specific intent to further the illegal purposes of such organizations, should await consideration until after the Commandant has passed upon the application. In light of the fact that appellant has admitted membership in the Communist Party, the Commandant's request for additional information indicates that he does not view past membership in the Party alone as sufficient reason to deny the application. It is evident, therefore, that this issue will not be presented in a meaningful context until all the facts are developed and the Commandant has ruled on the application.

Nor are the standards established for the granting of a special validation unconstitutionally vague. The screening program involved here is not designed to regulate the exercise of First Amendment rights but, rather, to protect shipping from sabotage. The criteria that are established are not absolute bars to the granting of an application but merely serve as factors to be considered in making a determination whether a special validation should be issued.

Finally, we submit that there is no merit to appellant's contention that in allowing the Commandant to take into consideration an applicant's past membership in the Communist Party, the regulations constitute a bill of attainder and an *ex post facto* law. The reg-

ulations provide that the Commandant shall make a determination of the applicant's present character; they do not make any past action of an applicant an absolute bar to the granting of his application. While an examination of an applicant's past conduct may lead to the conclusion that he is not presently qualified for a special validation, he is not being punished for his past actions. Thus, this case is clearly distinguishable from *United States* v. *Brown*, 381 U.S. 437, where the statute at issue made membership in the Communist Party at any time during a prior five-year period an absolute bar to service as a union executive.

ARGUMENT

Appellant failed to obtain a "special validation endorsement" on his Merchant Mariner's document because he refused to furnish certain information required by the Coast Guard relating to his admitted membership in the Communist Party and other organizations which appear on the so-called "Attorney General's List." Although he completed the application form prescribed for those who seek the necessary endorsement, answering all questions and freely admitting past membership in "several" of the listed organizations, he declined to answer further when asked to name the particular organizations to which he had belonged (except for the Communist Party), to state the periods involved and to describe the extent of his membership. Nor did appellant refuse to cooperate on the ground that the information required would tend to incriminate him; rather, he stood on the proposition that the questions were "obnoxious" and,

in effect, that the answers were "none of the government's business." As a result—as the appellant was expressly advised, and as the relevant regulation (33 C.F.R. 121.05(d)(2), App. Br. A14) prescribes—the application for special validation endorsement remains "in abeyance." However, the appellant has not been found to be "subversive" or otherwise unqualified. Indeed, upon furnishing the required information, he may yet obtain a ruling on his application and the result is not foreordained since past membership in a listed organization, even the Communist Party, is not automatically disqualifying.

In this posture of the case, the appellant cannot complain that the required procedures for obtaining the endorsement were improperly or unfairly applied to him. The challenge must be to the Magnuson Act screening program on its face. Accordingly, appellant broadly asserts that these procedures have not been validly authorized by Congress, and that, if properly authorized, then the entire program is unconstitutional for a variety of reasons. We consider each of these claims in turn.

I

THE SCREENING PROGRAM FOR MERCHANT SEAMEN HAS BEEN VALIDLY AUTHORIZED BY CONGRESS

It is not disputed that the regulations promulgated by the Commandant of the Coast Guard—including the provision directly involved here—are fully authorized by Presidential orders issued under the Magnuson Act. Indeed, the relevant Executive Orders (Nos. 10173 and 10352) expressly empower the Commandant

to require "specially validated documents" as a condition of employment on merchant vessels (33 C.F.R. 6.10–3, App. Br. A8), exempting certain categories of vessels if he thinks proper (33 C.F.R. 6.10–1, App. Br. A7), and direct him to deny such a document to any person whose "'character and habits of life" fail to satisfy the Commandant that his presence on board "would not be inimical to the security of the United States" (*ibid.*). While the Presidential orders do not specify how the Commandant is to "satisfy" himself concerning the fitness of a merchant seaman, his regulations providing for completion of an application form (33 C.F.R. 121.05(a), (b), (c), App. Br. A13–A14), and submission of additional information on request (33 C.F.R. 121.05(d), App. Br. A14), are plainly reasonable requirements implementing the Commandant's duty to prescribe "the conditions and the manner" of granting specially validated documents (33 C.F.R. 6.10–3, App. Br. A8). And, of course, it was proper to provide for enforcement of those requirements by withholding action on an application for special validation until the required information is supplied (33 C.F.R. 121.05(c)(2), (d)(2), App. Br. A14).

The claim, then, is not that the Commandant of the Coast Guard acted without authority, but that the President did. There are two arguments: first, that the Magnuson Act does not purport to empower the executive to establish the kind of screening procedure actually put into effect, and, second, that if the Act must be read to give such authorization, it is not a

valid delegation because insufficient guidelines are provided.

A. THE MAGNUSON ACT AUTHORIZES THE SCREENING PROCEDURES

The Magnuson Act, 64 Stat. 427, 50 U.S.C. 191, 192, 194, was enacted in 1950 during the Korean crisis. According to the Senate Committee report on the legislation (S. Rep. No. 2118, 81st Cong., 2d Sess.), Congress sought to give

> the President the power to safeguard against destruction, loss, or injury from sabotage or other subversive acts to vessel, harbors, ports, and other water-front facilities * * * [authorizing him] to employ such departments, agencies, offices, or instrumentalities of the United States as he may deem necessary to carry out the purpose of this measure, to give utmost protection to shipping facilities.

The Act was an amendment to existing legislation[5] under which sweeping security measures, including personnel screening programs, had been adopted during World War II. See Executive Order No. 9074, 7 Fed. Reg. 1587 (1942); Directives of the Commandant of the Coast Guard (April 15 and July 20, 1942). The procedures adopted during World War II authorized the removal of an individual from a vessel or waterfront facility upon a finding that the individual was a saboteur, spy, subversive, unsuitable criminal, drunkard, mental defective or one "whose presence on

[5] Act of June 17, 1917, Title II, 40 Stat. 220. The first two paragraphs of the present Section 191 of Title 50 U.S.C. were contained in the original Act.

board a vessel or on a waterfront facility would * * * constitute a menace to the national security or to the safety of life or property." See Brown and Fassett, *Security Tests for Maritime Workers: Due Process Under the Port Security Program,* 62 Yale L. J. 1163, 1188, n. 127 (1953).

At the time the 1950 Act was introduced in the Senate, Senator Magnuson referred to the need "to invoke security measures on the waterfront" and noted that "[u]nder the provisions of this bill, the President could, and probably would, call on the Coast Guard, the FBI or such other Government agencies as he might wish to use, to give us such waterfront security." 96 Cong. Rec. 10794, 81st Cong., 2d Sess.; see, also, *id.* at 11220, 11321. In addition, he expressly stated that the "measure will give the President the authority to invoke the same kind of security measures which were invoked in World War I and in World War II." 96 Cong. Rec. 10795. Thus, the legislative history manifests the intent of Congress to authorize the President to institute the type of screening programs involved here.

Nor did Congress fail to translate its purpose into the positive text of the statute. The language of the Act itself confers upon the President authority to screen persons who were to be employed upon merchant vessels or, if necessary, to take even more extreme action. Thus, the Act (50 U.S.C. 191, App. Br. A1–A2) provides that if the President finds it necessary in order to protect any vessel or harbor from damage or injury he "may take * * * full possession of such vessels and remove therefrom the

officers and crew thereof, and all other persons not especially authorized by him to go or remain on board thereof." The grant of power to the President to exclude from vessels all "persons not especially authorized by him to go or remain on board" clearly implies authority to establish a screening procedure for determining who shall be allowed on board.

We conclude that the court below, in accord with the Second and Ninth Circuits, was clearly correct in holding that the Magnuson Act authorizes the screening program challenged here. See *McBride* v. *Roland,* 369 F. 2d 65, 69 (C.A. 2), certiorari denied *sub nom. McBride* v. *Smith,* 387 U.S. 932; *Parker* v. *Lester,* 227 F. 2d 708, 715 (C.A. 9); *United States* v. *Gray,* 207 F. 2d 237, 241 (C.A. 9).

B. THE MAGNUSON ACT DOES NOT UNCONSTITUTIONALLY DELEGATE LEGISLATIVE POWER TO THE PRESIDENT

Appellant alternatively contends that if Congress has authorized the screening program at issue there has been an unconstitutional delegation of legislative authority. The question of the constitutional limitations on the authority of Congress to delegate power to the executive is presently before this Court in *United States* v. *Robel,* No. 8, October Term, 1967, in which reargument directed to this specific issue was had on October 9, 1967, Accordingly, we treat the matter only briefly here.

As we noted in our brief on reargument in that case, this Court has consistently held that there is no unlawful delegation where the act which confers

power on the executive sets forth, as far as reasonably practicable, the legislative purpose and an intelligible principle to govern its implementation. *Lichter* v. *United States,* 334 U.S. 742; *Yakus* v. *United States,* 321 U.S. 414; *Hirabayashi* v. *United States,* 320 U.S. 81; *United States* v. *Rock Royal Cooperative,* 307 U.S. 533; *Fahey* v. *Malonee,* 322 U.S. 245; *United States ex rel. Knauff* v. *Shaughnessy,* 338 U.S. 537. Applying this standard to the present case, we believe it is plain the Magnuson Act does not involve an unconstitutional delegation of congressional power.

The statute on its face gives clear expression to the legislative purpose of Congress "to secure * * * vessels from damage or injury, or to prevent damage or injury to any harbor" and "to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, [to] vessels, harbors, ports, and waterfront facilities * * *." In addition, the statute provides that this objective is to be accomplished by the President through the adoption of rules and regulations which may, if necessary, authorize the taking of "full possession and control of such vessels and [the removal] therefrom [of] the officers and crew thereof, and all other persons *not especially authorized by him* to go or remain on board thereof." (Emphasis added.) In short, the Act describes "what job must be done, who must do it, and what is the scope of his authority." *Bowles* v. *Willingham,* 321 U.S. 503, 515.

There can be no question that Congress could properly delegate to the President the responsibility for

determining when "the security of the United States is endangered." That determination, which depends in part on an assessment of intelligence reports and a weighing of foreign policy considerations, is peculiarly appropriate for the executive. *Zemel* v. *Rusk*, 381 U.S. 1, 17; *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304. In the circumstances, we submit Congress did not overstep established boundaries in leaving it to the President to decide when, and precisely how, to protect the vital merchant fleet, and the Nation's ports, from the dangers of subversion, espionage and sabotage.

II

THE SCREENING PROGRAM FOR MERCHANT SEAMEN DOES NOT INFRINGE CONSTITUTIONAL RIGHTS

We turn now to appellant's contention that the screening regulations and implementing procedures, if authorized, are unconstitutional because they infringe First Amendment rights, are impermissibly vague, fail to accord due process, constitute a bill of attainder, and operate *ex post facto*.

A. THE COMMANDANT'S INTERROGATORIES DID NOT INVADE FIRST AMENDMENT RIGHTS

In light of the procedural posture of this case at the administrative level, it is apparent that the basic question raised by this appeal is whether the Commandant may constitutionally defer action on appellant's application until he furnishes the requested

information.[6] As already noted, the Fifth Amendment privilege against self-incrimination is not involved.[7] Indeed, in refusing to answer the questions propounded, appellant rested on his contention that "it can be none of the government's business what he reads or what he thinks" (Exh. 5, J.A. 21–23), and he now argues that the First Amendment prohibits inquiries into an applicant's political beliefs or his organizational ties.

The governing principles were clearly set forth in *Barenblatt* v. *United States*, 360 U.S. 109, 126:

> * * * Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to

[6] As noted above, see p. 6 *supra*, appellant was specifically advised that his failure to respond would result in the application being held in abeyance. Compare *Konigsberg* v. *State Bar*, 353 U.S. 252, 261.

[7] Appellant never asserted that his refusal to answer the questions was based on his right under the Fifth Amendment to refuse to answer questions which might tend to incriminate him. Indeed, appellant freely admitted membership in the Communist Party. Thus, this case does not present the issue whether the assertion of the Fifth Amendment privilege in response to a question should be deemed a sufficient answer to require the Commandant to proceed with the further processing of the application. Compare *Blumenthal* v. *Federal Communications Commission*, 318 F. 2d 276 (C.A.D.C.), certiorari denied, 373 U.S. 951.

> bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.

We submit that the public interest in protecting the maritime industry from sabotage and subversion here outweighs the limited invasion of intellectual privacy which may result from the necessary screening program.

There can be no question that the federal government has a substantial interest in protecting our merchant fleet and harbor facilities from sabotage and subversive activities. From the beginning, shipping has been a matter of governmental concern, both because ocean commerce is vital to the welfare of the Nation and because of the importance of seapower as an agency of national defense. *E.g., Hume* v. *Moore, McCormack Lines,* 121 F. 2d 336, 345–346 (C.A. 2); Gilmore & Black, *The La wof Admiralty,* chapter XI (1957). Every aspect of shipping—including ship construction, preparation of ships for service, and procurement and qualifications of personnel—is closely regulated. Gilmore & Black, *supra,* 778–782. Appropriately, a government that regulates and subsidizes shipping, and provides training facilities for shipping personnel (see 46 U.S.C. § 1126), is concerned to protect shipping from subversive activity. And, certainly, the need for protective measures is not debatable. As one commentator has noted: "If the state of the world makes sabotage and espionage real dangers, the shipping industry is undoubtedly vulner-

able. Ships and docks are bottlenecks through which pass most military equipment bound overseas; and both are acutely flammable types of structures." Brown and Fassett, *op. cit. supra,* at 1165.

Given this substantial governmental interest in protecting shipping, the inquiries which are involved in the existing screening program are clearly justified. This Court has consistently recognized that a person's affiliation with the Communist Party and other subversive organizations is a proper matter for inquiry when there is a legitimate governmental interest to be protected. See, *e.g., Gerende* v. *Board of Supervisors,* 341 U.S. 56; *American Communications Assn.* v. *Douds,* 339 U.S. 382. Indeed, the public interest here is substantially greater than in many of the prior cases in which this Court has sustained the right of the government to make similar inquiries. See, *e.g., Konigsberg* v. *State Bar,* 366 U.S. 36, and *In Re Anastaplo,* 366 U.S.S. 82 (both involving relevance of Communist Party membership to character and fitness for practice of law); *Lerner* v. *Casey,* 357 U.S. 468 (involving a loyalty oath required as a precondition of employment by a municipal subway system); *Garner* v. *Board of Public Works of Los Angeles,* 341 U.S. 716 (loyalty oath as a prerequisite to employment in municipal civil service).

There can be no serious issue as to the relevancy of the questions asked the appellant. They concern his relationship with certain subversive organizations—plainly a material subject of inquiry. See *Barenblatt* v. *United States,* 360 U.S. 109, 127–132. As the Court

of Appeals for the District of Columbia Circuit said with respect to the employment of a former Communist as a radio-operator in the United States Merchant Marine in *Homer* v. *Richmond*, 292 F. 2d 719, 723:

> In view, especially at this period of our national life, of the sensitive nature of the positions involved—radio-telegraph operators on vessels of the Merchant Marine—positions closely associated with the nation's security, we think consideration of the ideological matters referred to [Communist Party membership, associations or activities] is permitted under the statute * * *.

See, also, *Borrow* v. *Federal Communications Commission*, 285 F. 2d 666 (C.A.D.C.), certiorari denied, 364 U.S. 892; *Cronan* v. *Federal Communications Commission*, 285 F. 2d 288 (C.A.D.C.), certiorari denied, 366 U.S. 904; *Blumenthal* v. *Federal Communications Commission*, 318 F. 2d 276 (C.A.D.C.); *Ogden* v. *United States*, 303 F. 2d 724 (C.A. 9).

Nor was it improper for the Commandant to inquire into appellant's association with other organizations on the Attorney General's list. While it is true that in *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, this Court found that the procedures for listing such organizations did not provide due process, the procedures were subsequently changed to comply with the Court's ruling. Executive Order No. 10450; see 28 C.F.R. 41.4. Since the organizations about which appellant was questioned were all designated pursuant to this revised procedure, there is no basis for a claim that they were improperly listed. At all events, the validity of the listing procedure is not de-

terminative of the Commandant's right to use the list as a starting place for his investigation. As the court stated in *McBride* v. *Roland,* 248 F. Supp. 459, 470 (S.D.N.Y.), affirmed, 369 F. 2d 65 (C.A.D.C.), certiorari denied *sub nom. McBride* v. *Smith,* 387 U.S. 932:

> The real answer to this afterthought is given by plaintiff himself when he points out that the difference between the use of the list in *McGrath* and here, is that in the former the list was used to establish a presumption while here it is used only as an element of evidence from which an inference ultimately was drawn. * * * The use made even if plaintiff could collaterally attack it, was not illegal.
>
> Nor does the Regulation create any presumption of disqualification from this list, but rather says that such information may be considered, which is what the Commandant did.

Since, as we have pointed out, the First Amendment did not preclude the Commandant from asking appellant relevant questions concerning his prior association with the Communist Party and other subversive organizations, there can be no constitutional bar to the Commandant's holding appellant's application in abeyance until those questions are answered. As stated in *Briehl* v. *Dulles,* 248 F. 2d 561, 574 (C.A.D.C.), reversed on other grounds *sub nom. Kent* v. *Dulles,* 357 U.S. 116:

> * * * There is nothing new or novel about requiring an applicant for a permit or a license to supply pertinent information under oath. Applicants for radio licenses and air route certificates must do so, and applicants for marriage licenses, voting privileges, and business

> permits must also. And, failing to supply the required data, the applicant cannot exercise his right.[8] * * *

See, also, *Konigsberg* v. *State Bar, supra,* and *In Re Anastaplo, supra; Borrow* v. *Federal Communications Commission, supra; Cronan* v. *Federal Communications Commission, supra;* and *Blumenthal* v. *Federal Communications Commission, supra.*

This Court's decision in *Speiser* v. *Randall,* 357 U.S. 513, is not to the contrary. That case involved a California law which provided that in order to qualify for a veteran's property-tax exemption the applicant must prove that he did not advocate the overthrow of the government of the United States. In that context, it was held improper to cast the burden on the applicant for the exemption. But the Court was careful to distinguish cases such as *Garner* v. *Board of Public Works, supra; Gerende* v. *Board of Supervisors, supra;* and *American Communications Assn.* v. *Douds, supra,* pointing out (357 U.S. 527) that

> [e]ach case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public.

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[8] The regulations of other government agencies, in addition to Federal Communications Commission and the Coast Guard, also make it clear that no consideration will be given to incomplete applications. See, for example, Federal Power Commission Regulations, 18 C.F.R. 4.31, and Civil Aeronautics Board Regulations, 14 C.F.R. 201.4(c)(8).

These same factors distinguish the present case from *Speiser*. Moreover, at this stage of the administrative proceedings, as we show presently, no issue of burden of proof is properly presented. Action on appellant's application has been withheld because he has refused to cooperate, not because he has failed to disprove a subversive character.

B. APPELLANT'S ATTACKS ON THE PROCEDURES FOR PROCESSING APPLICATIONS FOR SPECIAL VALIDATION ARE PREMATURE

Petitioner further contends that the screening procedures do not conform to the requirements of due process in that they allegedly place the burden on the applicant to establish that he is entitled to the special validation and permit the Commandant to consider matters which are not disclosed to the applicant. Closely related is the contention that the screening program is invalid because it allows the Commandant to base his determination that an applicant is not entitled to a special validation on a mere showing of membership in the Communist Party or other subversive organization, without a finding that the applicant is an active participant in the illegal functions of the particular organizations.

We submit that none of these claims is ripe for consideration at this point because appellant has not exhausted his administrative remedies. There is nothing in the current regulations to preclude the possibility that the processing of appellant's application will fully comply with the standards of due process. The regulations provide that if the application is denied appellant must be sent a notice which shall

> contain a statement of the reasons why the Commandant is not satisfied that the character and habits of life of the applicant or holder are such as to warrant the belief that his presence on board vessels of the United States

> would not be inimical to the security of the United States. Such notice shall be as specific and detailed as the interests of national security shall permit and shall include pertinent information such as names, dates, and places in such detail as to permit reasonable answer. [33 C.F.R. 121.11.]

Thus, on the face of it, the applicant is likely to know with particularity the issues he may choose to contest on the hearing which is afforded him. And at that hearing he will be permitted to offer evidence and to cross-examine witnesses against him.[9]

Similarly, the significance of appellant's arguments concerning the burden of proof allegedly imposed on him cannot be assessed until after a determination has been made to either grant or deny the application. While the executive orders (33 C.F.R. 6.10–7) do provide that before the Commandant may issue a special validation he must be satisfied that the applicant's "character and habits of life * * * are such as to authorize the belief that [his] presence * * * on board would not be inimical to the security of the United States", this standard is not addressed to the question of burden of proof.[10] Insofar as the com-

[9] 33 C.F.R. 121.19(f) provides:

> * * * Every effort should be made to produce material witnesses to testify in support of the reasons set forth in the Notice of the Commandant, in order that such witnesses may be confronted and cross-examined by the applicant or holder.

[10] We note that the original wording of the Executive Order (Executive Order No. 10173, § 6.10–1, 15 Fed. Reg. 7005) provided that the application should be denied if the Commandant found that the employment *would* be inimical to security. It has been said however that "No overt change in policy * * * accompanied the adoption of [the present] formula in place of the original one * * *." Brown and Fassett *op. cit. supra*, p. 1175.

plaint is that the applicant is required to submit an application and furnish answers to interrogatories relevant to his qualifications, the procedure seems wholly appropriate. After all, it is the mariner who wishes to obtain a document and special emergency validation and the information relevant to his fitness is normally in his keeping. In this sense, the burden placed upon him is usual and necessary—no different from that imposed on every person seeking employment, public or private, and every applicant for any permit or license.

At all events, since the alleged procedural defects of which appellant complains may have no effect on the processing of his application, he should be required first to exhaust his administration remedies. *Lerner* v. *Casey,* 357 U.S. 468, 473. As this Court stated in *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752, 773–774:

> It is true that the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention. But, * * * a strong showing is required, both of inadequacy of the prescribed procedure and of impending harm, to permit short-circuiting the administrative process. * * *[11]

[11] In *Parker* v. *Lester,* 227 F. 2d 708 (C.A. 9), the court did not require exhaustion of administrative remedies by seamen who had been initially *denied* validated documents because un-

Finally, appellant's contention that the regulations are invalid because they permit the Commandant to take into consideration his participation in the Communist Party or other subversive organizations without a showing that he had a specific intent to further the illegal objects of the organization should await consideration until after the Commandant has passed upon the application. Certainly, there is no present basis for such a claim here. On the contrary, the action of the Commandant in appellant's case to date refutes the contention that mere membership in a proscribed organization will be considered grounds for disqualification. Appellant has already admitted membership in some of the organizations on the list, including the Communist Party; yet his application has not been denied. Indeed, it is for the purpose of gaining specific information concerning appellant's knowledge, commitment, and purpose in membership that interrogatories have been directed to him.

We do not say that the Commandant would be foreclosed from considering, as a relevant factor, membership less active than might be necessary to justify the

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der the Coast Guard regulations *then* in effect the court could say in advance that the reviewing boards were incapable of affording due process with respect to notice and an opportunity to be heard. As noted above, such is not the case here.

In *Graham* v. *Richmond*, 272 F. 2d 517 (C.A.D.C.), the court held that the Commandant could not hold the application in abeyance because the regulations did not so provide. *Id.* at 521. Subsequent to that case the regulations were amended to require the Commandant to hold the application in abeyance until the questions are answered. 33 C.F.R. 121.05.

imposition of criminal sanctions. Compare *Elfbrandt* v. *Russell*, 384 U.S. 11; *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Scales* v. *United States*, 367 U.S. 203; and *Noto* v. *United States*, 367 U.S. 290. On the other hand, it is plain that the appellant has not automatically been disqualified because of mere past membership in the Communist Party. Where, in between, the line should be drawn presents difficult questions which, we submit, it is premature to decide on this barren record. Should appellant, at some later date, disclose the extent and character of his membership in listed organizations, it will be time enough to determine whether a basis for disqualification appears, if he is refused special validation on that account.

C. THE REGULATORY SCHEME IS NOT UNCONSTITUTIONALLY VAGUE

Appellant advances the further contention that the controlling standard for refusing special validation—whether the seaman's presence on board would be "inimical" to the security of the United States—is unconstitutionally vague. In our view, this argument was properly rejected here, as it was by the Second Circuit in *McBride* v. *Roland*, *supra*, 369 F. 2d at 69, where the court observed:

> Appellant's further contention that the regulation, in its use of the term "inimical," is unconstitutionally vague, is not well taken. In determining whether an applicant's presence would be not inimical the Commandant is permitted to consider certain types of information, including membership in an organization desig-

> nated by the Attorney General pursuant to Executive Order 10450 as amended. The Commandant has construed this to require "knowing" rather than "mere" membership, and such a construction in the context of "inimical" is surely not unreasonable. The term inimical itself has been used by the Court in a similar context. *Aptheker* v. *Secretary of State,* 378 U.S. at 511, 86 S. Ct. 1238. * * *

This Court's ruling in *Keyishian* v. *Board of Regents,* 385 U.S. 589, does not require a different holding. The program which was there invalidated—part of a "regulatory maze"—affected all public school teachers in New York and therefore directly trenched on academic freedom. Here, by contrast, we deal with the very real dangers of sabotage and subversion of vessels, harbors and ports—facilities vital to the commerce and defense of the Nation. Plainly, the same test is not appropriate. On the one hand, the need for broader protections here is obvious, and, on the other, the harm is less. In the present context, there can be no comparable "chilling effect."

D. THE REGULATIONS ESTABLISHING THE SCREENING PROGRAM DO NOT CONSTITUTE A BILL OF ATTAINDER OR *EX POST FACTO* LAW

One last contention deserves only brief answer: that the regulations constitute a bill of attainder and operate *ex post facto* in that they give the Commandant the right to exclude persons from serving as merchant seamen because of past membership in designated organizations. The argument is founded on an inaccurate factual premise—that the exclusion is based solely on past behavior.

The regulations provide that the Commandant shall make a determination relating to the present "character" of the applicant to determine whether his presence aboard a vessel would be inimical to the security of the United States. Of course, past conduct is relevant to a determination of present character and fitness for a sensitive position. But it does not follow that the applicant who is rejected, in part because his past illuminates his present character, is being punished for those past activities. See *Dent* v. *West Virginia,* 129 U.S. 114; *Hawker* v. *New York,* 170 U.S. 189; *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 87.

This case is wholly unlike *United States* v. *Brown,* 381 U.S. 437. There the statute made it a crime to serve as an officer of a labor organization for five years after membership in the Communist Party. That was direct punishment for past conduct, imposed by legislative action on a particular class of persons. Here, on the contrary, while past membership in the Communist Party may be considered as a relevant factor, it does not necessarily preclude a determination that the applicant is presently qualified for a special validation. Thus, unlike *Brown,* no disability arises *ipso facto* from the fact of membership in the Communist Party.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be affirmed.

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